

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

MCI, INC. COMMENTS

MCI, Inc. (MCI) respectfully submits these comments pursuant to the Federal Communications Commission’s (FCC or Commission) Public Notice (DA 04-3185), in the above referenced docket, putting forth for comment the Petition for Declaratory Ruling filed by American Teleservices Association (ATA) on August 24, 2004.¹ The Commission should grant ATA’s motion and clarify that certain provisions of the New Jersey Consumer Fraud Act and New Jersey Administrative Code (“New Jersey Rules”) relating to telemarketing, as applied to interstate calls, are preempted.

I. BACKGROUND AND SUMMARY

On July 3, 2003 the Commission issued an Order that revised and adopted new telemarketing rules pursuant to the Telephone Consumer Protection Act of 1991 (TCPA). Of relevance to ATA’s petition, the Commission adopted the following rules.

First, both the Commission rules and the TCPA itself exclude calls pursuant to an “established business relationship” from the term “telephone solicitations,” and thereby

¹ Public Notice, Federal Communications Commission, DA 04-3185, CG Docket No. 02-278 released October 4, 2004.

exclude them from the rules governing the do-not-call registry. The Commission defined the term “established business relationship” as follows:

“a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately proceeding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.”²

The subscriber’s established business relationship extends to an affiliated entity if the subscriber would reasonably expect them to be included given the nature and type of goods or services offered and the identity of the affiliate.³

Second, the Commission established explicit identification requirements when making calls for telemarketing purposes. Specifically, the person or entity making the call must provide the called party with “the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.”⁴

Third, the Commission rules establish the procedures for handling company-specific do-not-call requests. In particular “no person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of

² 47 CFR §64.1200(f)(3).

³ 47 CFR §64.1200(f)(3)(ii).

⁴ 47 CFR §64.1200(d)(4).

persons who request not to receive telemarketing calls made by or on behalf of that person or entity.”⁵ Indeed “a person or entity making a call for telemarketing purposes must obtain a consumer’s prior express permission to share or forward the consumer’s request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.”⁶

The New Jersey Rules at issue permit persons or entities to call, for telemarketing purposes, consumers on the “No Telemarketing Call” list if the consumer is an “existing customer,” but defines that term significantly different than the Commission’s definition of “established business relationship.”⁷ The New Jersey Rules also do not extend the established business exemption to *any* affiliated entities.⁸ The New Jersey identification rules also are different from the Commission’s rules in that they require the identity of the telemarketing vendor making the call on an entity’s behalf be provided and require the disclosure to be made within the first thirty (30) seconds of the telephone call.⁹ Further the New Jersey Rules conflict with the Commission’s rules if the New Jersey Rules are interpreted to require company-specific do-not-call requests to be applicable to telemarketing vendors that may be making calls on behalf of multiple entities.¹⁰

As these New Jersey telemarketing rules substantially conflict with the Commission’s telemarketing rules, the Commission should explicitly state that, with

⁵ 47 CFR §64.1200(d)

⁶ 47 CFR §64.1200(d)(3)

⁷ N.J. ADMIN CODE tit 13, 45D-1.3 (2004).

⁸ *Id.* 13:45D-4.5.

⁹ *Id.* 13:45D-4.3(a).

¹⁰ *Id.* 13:45D-3.9

regard to application of the rules to interstate calls, these rules are preempted by the federal rules.

II. The New Jersey Telemarketing Rules are Inconsistent with the Federal TCPA Rules.

The TCPA provides States the authority to enforce the *federal* do-not-call rules,¹¹ but limits their authority to impose additional State requirements to intrastate calls.¹² As the Commission stated in its *2003 TCPA Order*, “[a]lthough section 227(e) gives states authority to impose more restrictive intrastate regulations, [the Commission] believe[s] that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. [The Commission] concludes that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion.”¹³ As the Commission further states, “the record in this proceeding supports the finding that application of inconsistent rules for those that

¹¹ “Authority of States. – Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions . . .” Section 227(f)(1).

¹² State law not preempted – Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits...the making of telephone solicitations. Section 227(e)(1).

¹³ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, FCC 03-153, para. 83 (2003)(“2003 TCPA Order”).

telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.”¹⁴

The New Jersey rules at issue are clearly inconsistent with the federal rules and disrupt the federal objective.

Established Business Relationship (EBR): The New Jersey rules disrupt the balance struck by the Commission by limiting the EBR exemption to those customers with whom the seller currently has an ongoing transaction. It denies an EBR based on recent transactions, inquiries, personal relationships, and to affiliates.

As the Commission notes, the ability of sellers to contact those with whom they have EBR is not only an important aspect of their business plan, it provides consumers valuable information regarding products or services that they may have purchased from the company.¹⁵ The Commission specifically determined that an eighteen (18) month period from the time of last payment or transaction for the existence of an EBR strikes the appropriate balance between industry practices and consumer’s privacy interests.¹⁶ The Commission also found, and suggests that Congress contemplated, that an inquiry by a consumer is a basis for an EBR if the response to such inquiry occurs within a reasonable time.¹⁷ It is clearly not in a consumer’s interest to prohibit a company from providing information sought by that consumer. Additionally, the Commission found that affiliates fall under the EBR if based on consumer’s reasonable expectations of

¹⁴ *Id.*

¹⁵ 2003 TCPA Order, para. 42.

¹⁶ *Id.* at para. 113.

¹⁷ *Id.* at para. 114.

which companies will call them.¹⁸ This is important in the telecommunications industry where many related products are sold under the same company or brand name but provided by various affiliates. A rule denying affiliates an EBR with the consumer could deny consumers information on cost saving company plans.

Identification Rules: The New Jersey identification rule is inconsistent with the federal rule by requiring a vendor calling on behalf of an entity to be identified in addition to the entity on behalf of whom the call is made. This requirement imposes a significant burden on nationwide entities. Campaigns are rarely designed by state. When a vendor is making calls for MCI, the calls are being made to a variety of states one after another. So the telemarketing representative would have to recognize that the call from any campaign is being made in New Jersey and remember to change his or her identification in the opening line. Even with the best of training, there can be inadvertent human errors.

Moreover, there is no need for the vendor to be separately identified. MCI's telemarketing vendors provide additional personnel for MCI. MCI employees design the campaigns, MCI employees train and monitor the representatives and MCI systems dial the calls. From the consumer's standpoint, there is virtually no difference when an MCI employee or a vendor employee calls a consumer to offer MCI products. Indeed the requirement could cause confusion. If two names are provided the consumer will be unsure as to whose product is being offered and who is responsible for the call.¹⁹

¹⁸ *Id.* at para. 117.

¹⁹ Commission rules state that "if [the do-not-call] requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the

Company-Specific Do-Not-Call Requests: A New Jersey rule requiring a company-specific do-not-call request to apply both to the entity on behalf of whom the call was made and the telemarketing vendor would conflict with the language and intent of the Commission's company-specific do-not-call rules. Company-specific lists are intended to allow consumers to "halt calls *selectively*."²⁰ Yet under the New Jersey Rules, as they have been interpreted,²¹ a request to have one particular marketer stop calling could result in the consumer's inability to receive calls from other marketers with products with whom the consumer has an interest, if the initial marketer happens to use a vendor for its telemarketing. This was not the intent of the Commission company-specific rules. The national registry is intended to address general do-not-call requests. Moreover, the Commission's rules specifically prohibit sharing or forwarding of the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity, without the customers permission.²²

person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request." 47 CFR §64.1200(d)(3).

²⁰ 2003 TCPA Order, para. 88 (emphasis added).

²¹ See ATA Petition, p. 10.

²² 47 CFR §64.1200(d)(3).

III. CONCLUSION

For the aforementioned reasons, the Commission should grant ATA's petition and explicitly state that certain provisions of the New Jersey Consumer Fraud Act and New Jersey Administrative Code ("New Jersey Rules") relating to telemarketing are preempted by the Federal TCPA rules.

Respectfully submitted,

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